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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

No._____

MARTIN HEISE,

Petitioner,

v.

VILLAGE OF PEWAUKEE,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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October 21, 1980

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ARGUMENT

THE UNITED STATES SUPREME COURT LACKS JURISDICTION BECAUSE THE CONSTITUTIONAL ISSUE WAS NOT RAISED IN THE STATE COURTS.

The United States Supreme Court lacks jurisdiction to issue a writ of certiorari because the constitutional issue advanced in support of the petition for the writ was not raised in the Wisconsin courts.

This court has held that it will not review constitutional issues by certiorari to a State Supreme Court unless those issues were sufficiently and properly presented in the State courts. In Street v. New York, 394 U.S. 576; 581-585 89 S.Ct. 1354, 22 L.Ed. 2nd 572 (1969), the court held:

> "Hence, in order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it. See 28 U.S.C. §§ 1257(2), 1257(3); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945). Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. See, e.g. Bailey v. Anderson, supra; Chicago, I.&L.R. Co. v. McGuire, 196 U.S. 128, 131-133 (1905).

> The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." At pp. 581 - 582.

Contrary to petitioner's assertion, Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2nd 297 (1973) does not support issuance of a writ of certiorari in the instant case. In Chambers v. Mississippi (supra) this court did not change the jurisdictional requirements enunciated in Street v. New York (supra) for the issuance of a writ of certiorari to a State Supreme Court. On the contrary the court in Chambers stated:

> "In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures."
>
> Chambers v. Mississippi (supra) at p. 303

That this court in Chambers did not alter its previously enunciated jurisdictional requirements for issuance of a writ of certiorari to a State Supreme Court is emphasized by the concurring opinion of Mr. Justice White. Mr. Justice White, restating the rationale of the dissent of Mr. Justice Rehnquist, while disagreeing with the conclusion of the dissenting opinion, wrote:

> "We would not ordinarily expect an appellate court in the state or federal system to remain silent on a constitutional issue requiring decision in the case before it. Normally, a court's silence on an important question would simply indicate that it was unnecessary to decide the issue because it was not properly before the court or for some other reason. As my Brother Rehnquist points out, the Court stated in Street v. New York, 394 U.S. 576, 582 (1969), that 'when...the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the

> aggrieved party in this Court can affirmatively show the contrary.'
>
> Under this rule it becomes the petitioner's burden to demonstrate that under the applicable state law his claim was properly before the state court and was therefore necessarily rejected, although silently, by affirmance of the judgment. If he fails to do so, we need not entertain and decide the federal question that he presses."
>
> Chambers v. Mississippi (supra) at p. 303.

Additionally, the facts in Chambers are so dissimilar from the facts in the instant case that Chambers is barely relevant and certainly not controlling with regard to the question of whether or not this court should issue the writ in the case at bar. In the Chambers decision this court stated with regard to petitioner, Chambers:

> "In large measure, he was thwarted in his attempt to present this portion of his defense by the strict application of certain Mississippi rules of evidence. Chambers asserts in this Court, as he did unsuccessfully

in his motion for new trial and on appeal to the State Supreme Court, that the application of these evidentiary rules rendered his trial fundamentally unfair and deprived him of due process of law.[3] It is necessary, therefore, to examine carefully the rulings made during the trial."

---

[3]On the record in this case, despite the State Supreme Court's failure to address the constitutional issue, it is clear that Chambers' asserted denial of due process is properly before us. He objected during the trial to each of the court's rulings. As to the confrontation claim, petitioner asserted, both before and during trial, his right to treat McDonald as an adverse witness. His motion for new trial, filed after the jury's verdict, listed as error the trial court's refusal to permit cross-examination of McDonald and the exclusion of evidence corroborative of McDonald's guilt. The motion concluded that the trial "was not in accord with fundamental fairness guaranteed by the Fourteenth Amendment of the Constitution." Chambers reasserted those claims on appeal to the State Supreme Court. After the affirmance of his conviction by that court, Chambers filed a petition for rehearing addressed almost entirely to the

> claim that his trial had not been conducted in a manner consistent with traditional notions of due process. The State Supreme Court raised no question that Chambers' claims were not properly asserted, and no claim has been made by the State - in its response to the petition for certiorari, in its brief on the merits, or at oral argument - that the questions are not properly reviewable by this Court. See Street v. New York, 394 U.S. 576, 581-585 (1969); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67-68 (1928).
>
> Chambers v. Mississippi (supra) at p. 289 & 290

The petitioner herein, unlike the petitioner, Chambers, and unlike the petitioner in Street v. New York (supra), failed to raise the constitutional issue in either the trial court or the State appellate court.

Wisconsin law requires that objections and claims of error must be raised during the trial.

Wis. Stats. Sec. 805.11 provides as follows:

> 805.11 Objections, exceptions. (1) Any party who has fair opportunity to object before a ruling or order is made must do so in order to avoid waiving error. An objection is not necessary after a ruling or order is made.
>
> (2) A party raising an objection must specify the grounds on which the party predicates the objection or claim of error.
>
> (3) Exceptions shall never be made.
>
> (4) Evidentiary objections are governed by s.901.03.

Petitioner failed to raise the due process issue presented herein during the trial.

Notwithstanding the provisions of Wis. Stats. Sec. 805.11, and petitioner's failure to raise the due process issue during the trial, petitioner had numerous other opportunities to raise the constitutional issue before the trial court and either specifically declined to do so or neglected to do so.

After the trial, the trial court summoned the parties for the specific purpose of allowing petitioner to make a record regarding the matters alleged herein as being violations of petitioner's right to due process. (Appellant's App. P. A-31 - A-34). Both petitioner and his counsel specifically refused to raise on the record the issue of due process at that time despite having been given the opportunity to do so.

The petitioner could also have raised the issue in a motion for a new trial. Wisconsin law provides that a party may move the court for a new trial and specifies the grounds upon which the motion may be granted.

> 805.15 New Trials. (1) Motion. A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the in-

terest of justice. Orders granting a new trial on grounds other than in the interest of justice, need not include a finding that granting a new trial is also in the interest of justice.

805.15(3) Newly-discovered evidence. A new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:

(a) The evidence has come to the moving party's notice after trial; and

(b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and

(c) The evidence is material and not cumulative; and

(d) The new evidence would probably change the result.

Additionally, Wisconsin law provides:

805.17 Trial to the Court. (1) Motion at Close of Plaintiff's Evidence. After the plaintiff, in an action tried by the court with-

out a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the grounds that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff on that ground or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in sub. (2). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section operates as an adjudication upon the merits.

(2) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the ultimate facts and state separately its conclusions of law thereon. The court shall file its findings and conclusions prior to rendering judgment. In granting or refusing interlocutory injunctions the court shall similarly file its written findings of fact and conclusions of law which

constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a referee may be adopted in whole or part as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of ultimate fact and conclusions of law appear therein. If the court directs a party to submit proposed findings and conclusions, the party shall serve the proposed findings and conclusions on all other parties not later than the time of submission to the court. The findings and conclusions or memorandum of decision shall be made as soon as practicable and in no event more than 60 days after the cause has been submitted in final form.

(3) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial.

> (4) Appeal. In actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has objected in the trial court to such findings or moved for new trial.

The Waukesha County Circuit Court judgment roll in Case #37179, Martin Heise v. Village of Pewaukee, indicates that no motion for a new trial was filed by petitioner.

Additionally, Wis. Stats. Sec. 806.07 provided petitioner with the opportunity to raise the matters alleged herein as the basis for issuance of the writ of certiorari by a motion to be relieved from the judgment.

> 806.07 Relief from Judgment Order. (1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;

(b) Newly-discovered evidence which entitles a party to a new trial under s.805.15(3);

(c) Fraud, misrepresentation, or other misconduct of an adverse party;

(d) The judgment is void;

(e) The judgment has been satisfied, released or discharged;

(f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;

(g) It is no longer equitable that the judgment should have prospective application; or

(h) Any other reasons justifying relief from the operation of the judgment.

(2) The motion shall be made within a reasonable time, and, if based on sub. (1) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1) (b) shall be made within the time provided in s.805.16. A motion under this section does not affect the finality of

> a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

The aforementioned judgment roll in the instant case indicates that no motion to be relieved from the judgment was filed by petitioner.

Petitioner also failed to raise in his appeal to the Wisconsin Supreme Court the issues presented herein as the basis for issuance of a writ of certiorari.

Petitioner identified and presented the following six issues to the Wisconsin Supreme Court in his appellate brief:

> 1. The disputed portion of Lake Street, originally deeded to plaintiff-respondent to be used only as a public street or highway approach to Pewaukee Lake, reverted to defendant-appellant upon the plaintiff-respondent's discontinuance of such use;

2. The defendant-appellant is entitled to the full and unencumbered ownership in fee of the subject property as neither the Village nor the public has accepted the prior dedication;

3. Alternatively, defendant-appellant is entitled to such portion of the subject property as has been abandoned by the Village and the public;

4. Under the provisions of Section 80.32 of the Wisconsin Statutes, defendant-appellant is entitled to the disputed property by virtue of the abandonment of it by the Village and the fact that no highway tax has been expended for it during the past five years;

5. If the court should deny defendant-appellant's arguments as set forth in 1 through 4, inclusive above, defendant-appellant is nevertheless entitled to use so much of the land as does not interfere with the public's right; and

6. A primary question before the trial court was whether the disputed land was part of a recorded plat.

Index to Appellant's Brief filed 5/19/80, Wisconsin Supreme Court Case #79-1830; Martin Heise v. Village of Pewaukee, 92 Wis. 2d 333.

Petitioner identified and presented the following four additional issues to the Wisconsin Supreme Court in his reply brief:

1. No interest was ever created in Lake Street in favor of the respondent by virtue of the plat of Lakeview Addition in 1887;

2. The court's consideration of the plat of Clark's subdivision and its subsequent finding of a common law dedication is irrelevant since a dedication had already occurred by virtue of the 1896 deed;

3. The trial court errored in its finding that Lake Street had been maintained by the respondent and that, therefore, there was no reversion; and

4. While the plat of Clark's subdivision cannot serve as a dedication of the area in ques-

> tion to the respondent, it does further evidence an intent on the part of the respondent to discontinue the allowed use set forth in the 1896 deed and to abandon the area in question.
>
> Index to Appellant's Brief filed 1/23/78, Wisconsin Supreme Court Case #76-749, Martin Heise v. Village of Pewaukee, (supra).

Thus none of the issues which petitioner identified and presented on appeal to the Wisconsin Supreme Court raised or dealt with the question of due process. Only at the conclusion of the reply brief did petitioner make a vague and passing reference to the subject matter which he now alleges should serve as adequate basis for the issuance of a writ of certiorari.

PETITIONER PRESENTED THE ISSUES HEREIN TO THE WISCONSIN SUPREME COURT IN A LEGAL PROCEEDING WHICH WAS SEPARATE AND DISTINCT FROM THE CASE AT BAR.

On February 1, 1977, petitioner filed a complaint with the Wisconsin Judicial

Commission alleging that Judge Neal Nettesheim had engaged in judicial misconduct while conducting the trial in the case which is the subject of this petition. The essence of petitioner's complaint was that Judge Nettesheim had violated the Wisconsin Code of Judicial Ethics (Appellant's App. P.4) in that he was not impartial and had failed to disqualify himself, and in that he had permitted ex parte communications to influence his decision. An investigation was conducted by the Commission.

On March 30, 1977, petitioner filed a petition for writ of certiorari to the Wisconsin Judicial Commission with the Wisconsin Supreme Court. The parties filed briefs in May of 1977.

On July 1, 1977, the Wisconsin Supreme Court deferred action on the petition until after disposition of the appeal in Martin Heise v. Village of Pewaukee, 92 Wis. 2d 333. On July 22, 1977, the Court denied a Motion for Reconsideration of that decision.

On December 21, 1979, the Court denied Mr. Heise's Motion for Production of Documents. On March 11, 1980, the Court denied Mr. Heise's aforementioned Petition for Writ of Certiorari to the Wisconsin Judicial Commission.

The Judicial Commission received no other complaint from petitioner against Judge Nettesheim and closed its file on the matter following the Court's decision on March 11, 1980.

CONCLUSION

The issues presented as the basis for this petition for issuance of a writ of certiorari to the Wisconsin Supreme Court were never raised in the Wisconsin courts as a part of the case entitled Martin Heise v. Village of Pewaukee (supra). Petitioner elected to raise the due process issue through the Wisconsin Judicial Commission in a legal proceeding which is not before this court. The petition for writ of certiorari should be denied as the

United States Supreme Court lacks jurisdiction to issue the writ.

Respectfully Submitted,
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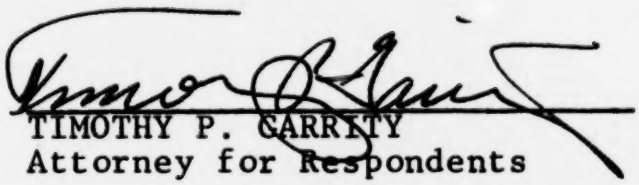
October 21, 1980

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 1980, three copies of the response to petition for writ of certiorari were mailed, postage paid, to Mr. William H. Lynch, Attorney at Law, 161 West Wisconsin Avenue, Milwaukee, Wisconsin 53203, counsel for the petitioner. I further certify that all parties required to be

served have been served.



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